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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No.

GRAIN ELEVATOR, FLOUR AND FEED MILL WORKERS, INTERNATIONAL LONGSHOREMEN ASSOCIATION, LOCAL 418, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The Decision and Order of the National Labor Relations Board, (JA [1] 243-299) including the Intermediate Report of the Trial Examiner is reported at 155 NLRB 402. The opinion of the Court of Appeals for the District of Columbia is reproduced in Appendix A to this petition and is reported at 376 F. 2d 774.

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[1] "JA" refers to the Joint Appendix in the Court below.

JURISDICTION

The judgment of the Court of Appeals was entered on March 31, 1967. On June 28, 1967, Mr. Justice Brennan granted Petitioner an extension of time for filing a writ of certiorari until August 28, 1967. This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED[2]

1. May appeals to employees of a secondary employer not to assist in the day-to-day operations of the struck employer be held unlawful under § 8(b)(4)(B) of the National Labor Relations Act because (1) they are made by a "secondary union" and (2) no primary picket line has been established at the situs of the dispute?

2. May a Court of Appeals enforce an order of the National Labor Relations Board, based on a Board-created rule of general application whereby illegality is conclusively presumed from the absence of certain conditions, although the Board has failed to consider whether those conditions are necessary in the case before it?

STATUTE INVOLVED

This case involves §§ 7, 8(b)(4)(B) and 13 of the National Labor Relations Act as amended, 49 Stat. 449, *et seq.*, 61 Stat. 136, *et seq.*, 29 U.S.C. § 151 *et seq.* They are reprinted in Appendix "B", p. 15a, *infra*, to this Petition.

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[2] If certiorari is granted, petitioner reserves the right to argue that the procedures followed by the National Labor Relations Board denied it due process of law.

STATEMENT OF THE CASE

In this case, the Court of Appeals affirmed the decision of a sharply divided National Labor Relations Board, holding that a secondary union may not appeal to its members to withhold those services which aid the normal operations of a struck or primary employer if the primary union fails to or is prevented from establishing a picket line at the situs of the dispute.

A. The Underlying Facts

In 1962, the Seafarers International Union of Canada picketed the ships of Upper Lakes Shipping, Ltd., a Canadian concern, when those ships docked in Chicago and other ports. Members of Locals 101 and 418 of the International Longshoremen Association (ILA), employed by the Continental Grain Company (Continental), a grain shipper with loading facilities on the Chicago docks, refused to load Upper Lakes ships though performing all other duties assigned to them by Continental. JA 27-46. Continental filed secondary boycott charges against the Seafarers International Union of North America (SIU) and Locals 101 and 418, ILA, but the General Counsel of the Labor Board dismissed the charges without issuing complaints. JA 92.

The following year, 1963, Upper Lakes ships were not picketed because the picket line had been removed pursuant to a state court injunction. (JA 290). Continental employees continued to refuse to load Upper Lakes ships though performing all other normal duties. An official of Local 418 advised Continental that there was "an invisible picket line" around Upper Lakes ships. (JA 282). Once again secondary boycott charges were filed, but this time complaints were issued against SIU and Local 418 but not against Local 101.

Following lengthy proceedings under Section 10(l) of the Act, Upper Lakes ships were loaded. The complaint did not allege and the Board did not find that any member of Local 418, Petitioner herein, refused to perform any services except those connected with the normal operations of Upper Lakes ships, the struck employer. (JA 227).

B. The Board's Decision

Although recognizing the right of both primary and secondary unions "to appeal to employees approaching struck 'ambulatory' premises to refrain from entering those premises", (JA 290), a majority of the Board held that no such right exists in the absence of picketing by the primary union. (JA 288). The majority held, that since there was no picket line, (picketing having been enjoined by a state court) Local 418 had violated Section 8(b)(4) by inducing its members to withhold services which aided the normal operations of Upper Lakes.[3] Though admitting that there was an "appearance of logic" in the ILA's contentions that (1) limited appeals to secondary employees of the type allegedly made here are permissible and (2) no legal significance may attach to the fact that the appeals were made by a secondary rather than a primary union, the majority held:

> ". . . at least in a case such as this one, where the labor dispute is between a primary employer with an ambulatory situs and a union other than the one which seeks to induce secondary employees

[3] The charges against the SIU were dismissed since the International, respondent before the Board, was not proven responsible for the acts of its subordinate bodies. (JA 280-281).

> to take action because of that dispute, there must be some clear and contemporaneous notice given by the primary union to the employees appealed to, and to the neutral employer at whose premises the dispute becomes active, that the labor dispute involved is between it and the primary employer. Unless such notice is given, the dispute takes on the appearance and character of a dispute between the "inducing" union and the neutral employer over the latter's dealings with the primary employer rather than of a dispute between the primary union and the primary employer." (JA 288)

In a vigorous dissent, Members Brown and Jenkins attacked the majority's "willingness to attach controlling significance to the absence of actual picketing at the situs in distinguishing lawful primary and unlawful secondary activity." JA 297. Rebutting the majority's view that the absence of picketing created the "possibility" that Continental would become completely enmeshed in a labor dispute not of its own making, the dissenters pointed out that *in fact* Continental's employees had loaded grain on ships owned by all companies other than Upper Lakes. JA 296. According to the dissenters ". . . the simple answer to the majority's contention is that the record evidence refutes it here. For SIU, Canada, did not induce Continental's employees to engage in a general strike against their own employer; nor did Continental's employees refuse to load grain on ships owned by companies other than Upper Lakes. In essence, then, Continental was not enmeshed in the instant dispute to any greater extent than if SIU, Canada, had maintained a lawful picket line around the SS *Shaw* which resulted in a refusal by Continental's employees to load grain on that ship. Indeed, it can be persuasively

argued that the absence of a picket line here afforded Continental, a neutral, greater protection—it removed the possibility that various third parties arriving at the situs to do business with Continental (unrelated to loading Upper Lakes' ships) might refrain from doing so upon observing a picket line around the struck ship." (JA 296-297.)

C. The Court of Appeals' Decision

The Court of Appeals affirmed, holding that the Board is not precluded from banning "non-picketing appeals merely because the resulting secondary impact may be no different from that which may ensue from permissible picketing appeals. In short, Congressional approval of a union's use of a particular time-honored means, notwithstanding possibility of certain practical consequences, does not constitute a warrant to reach for the same or equivalent consequences regardless of means used." (P. 10a, *infra*.) The Court held that the Board has administrative latitude to establish a general rule basing legality upon the means of communication adopted by the union, and that the Board's requirement of on the scene picketing in order to provide notice to third parties of the nature of the dispute does not exceed that latitude. Though terming "unfortunate" the Board's failure to discuss the fact that all parties involved here had notice in fact of the nature of the dispute despite the lack of picketing and that the work stoppages were confined to operations impinging on Upper Lakes, the Court excused this omission:

> "The Board could properly adopt a rule that would assure general and adequate notice, and avoid a doctrine that would require it to determine in each case all the employees that might have occasion to visit the plant and whether they do or would

have adequate notice of the labor situation. It seems to us permissible for an agency—like a legislature or court—to devise a rule setting forth certain conditions or requirements on the ground that these will be necessary in most instances to achieve a desired goal, without having to consider for every single situation whether they are necessary for that case." (p. 13a, *infra.*)

REASONS FOR GRANTING THE WRIT

I. The Court Below Has Decided a Question of General Importance in Conflict With Long-Established Precedent in This Court

The refusal of the longshoremen to load the *S.S. Shaw* was a refusal by employees of a secondary employer to perform tasks which aided the primary employer's everyday operations. This Court has held that union appeals to secondary employees to withhold such services are lawful. *Electrical Workers* v. *Labor Board (General Electric)*, 366 U.S. 667, 680-681; *Steelworkers* v. *Labor Board (Carrier)*, 376 U.S. 492, 498. Nevertheless, the Court below has sustained the decision of a divided Board that petitioner had violated the Act because of two circumstances: 1) The appeals not to perform the work were made by a union other than that which represented the employees of the struck primary employer; and 2) The striking union did not establish a picket line at the situs of the dispute. The Board and the Court below have thus imported into this critical and much litigated area of labor relations —that of the permissible range of economic activity where the operations of two employers (and their employees) interact—two novel elements which are without foundation in either the language or the objectives of the Act. Review by this Court is necessary since neither of these requirements is consistent with the

holdings of this Court, and since the Board majority has enunciated in this case a broad rule of general application predicated upon these novel requirements which will have fundamental and far-reaching importance to labor management relations.

The imposition of special limitations on the activities of what were called below "secondary unions" has since been explicitly rejected by this Court and would therefore, even if it stood alone, warrant reversal of the judgment below. The further holding that the presence of a picket line is necessary to validate a refusal of the secondary employer's employees to aid in the day-to-day operations of the primary employer not only distorts the statute, but also raises serious questions of federalism and under the First Amendment.

1) It was held below that the appeals were unlawful because they were made by the ILA, rather than by the SIU which represented the employees of the primary employer. Shortly after the decision below issued, this Court held that the legality or illegality of union conduct under § 8(b)(4)(B) cannot turn on the identity of the union whose members refused to perform services in aid of the primary employer. *Houston Contractors Association* v. *National Labor Relations Board,* 386 U.S. 664. The Court quoted with approval an earlier decision of the Board which stated the correct rule:

> "Congress was not concerned to protect primary employers against pressures by disinterested unions, but rather to protect disinterested employers against direct pressures by any union."[4]

[4] *United Association of Journeymen, Local 106 (Columbia-Southern Chemical Corporation),* 110 NLRB 206, 209, quoted at 386 U.S. 668.

This rule is in accord with the *General Electric* and *Carrier* cases which teach that the primary or secondary character of appeals to engage in refusals to perform work depends exclusively on the "type of work" being performed by the secondary employees. *Electrical Workers* v. *Labor Board,* 366 U.S. 667, 680-681; *Steelworkers* v. *Labor Board,* 376 U.S. 492, 497. Where, as here, the only "type of work" withheld is that which aids the normal operations of the primary employer, the pressure is primary, not secondary. That one source of this pressure against the primary employer is a "secondary union" is wholly irrelevant. The judgment below thus rests upon a distinction which has no foundation in the statutory language and which has now been thoroughly discredited by this Court. It should not be allowed to stand.

2) The second factor relied on below to establish a violation—the *absence* of a picket line—simply stands the law of secondary boycotts on its head. Since § 8 (b)(4) was originally enacted in 1947, countless cases have sought to achieve a balance between the right of employees to engage in concerted activity against a struck employer and the prohibition against enmeshing the neutral employer. These problems have been recognized as being particularly acute when a picket line is established at a situs common to both. Since the earliest decisions under Taft-Hartley, the Board has frequently expressed concern that picketing, unlike other methods of appeal, has the potential of widening labor disputes unjustifiably by instigating general work stoppage by secondary employees. In the landmark *Moore Dry Dock* decision itself, the Board made absolutely clear that oral appeals to secondary employees to withhold only those services that aided the

primary employer were permissible, while deciding picketing must be conducted under carefully circumscribed conditions in order to minimize the danger of total work stoppages by secondary employees. Yet, in the instant case, the picket line, far from being a source of special concern, is viewed as a saving grace, an indispensable pre-condition to the otherwise lawful refusal of secondary employees to assist the day-to-day operations of the primary employer.

The Board did not purport to find justification for this paradoxical result in the language of § 8(b)(4)(B). Instead, it stated that the picket line is necessary because, "there must be some clear and contemporary notice given by the primary union to the employees appealed to, and to the neutral employer at whose premises the dispute becomes active, that the labor dispute involved is between it and the primary employer". JA 288. This reasoning is on its face fallacious, since violations of § 8(b)(4) depend not on the "appearance and character" of the dispute but on the means and objectives of the union. *General Electric, supra,* 366 U.S. at 672-673, and cases cited at p. 22, n. 11, *infra.* There is nothing in the text of the statute which requires that notice be given of the scope of the dispute. Rather, that requirement was developed in *Moore Dry Dock,* 92 NLRB 547 and subsequent cases to protect neutral employers from a general strike which might result from the inherent ambiguity of picket line appeals at a common situs. Now, the notice which had been deemed necessary to protect against the potentially impermissible broadening of the dispute by the presence of a picket line is suddenly regarded as an end in itself, and picketing is mandated as a prerequisite for other methods of appeal which themselves do not create similar hazards

of enmeshing the neutral employer in a controversy not his own. It will seem ironic to anyone familiar with the history of the problem that the result in this case should be thought to be compelled by the *Moore Dry Dock* decision.[5] Yet, this is precisely what the Board said:

> "The underlying considerations that lead the Board in ambulatory situs situations to infer an unlawful objective when picketing deviates from *Moore Dry Dock* standards also dictate a like inference where pressures are exerted against the neutral employees by a secondary union in the absence of a picket line directed at the primary employer while this situs of the dispute is lodged at the neutral premises. A failure to draw an inference of illegality in such circumstances would give, it seems to us, greater freedom to secondary unions to disrupt the business of the neutral employer whose premises temporarily house the primary ambulatory situs, than is given under our *Moore Dry Dock* tests to the primary union directly involved."

We submit that the Board is without power, in the guise of drawing inferences or otherwise, to predicate

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[5] The irony is heightened by the fact that in *Moore Dry Dock* itself there were numerous non-picketing appeals to employees. In holding these to be lawful, the Board did not rely on the existence of primary picketing. Rather, the Board decided that because they "invited action only at the *situs* of dispute * * * they must be considered as primary action." 92 NLRB at 551-552. This principle had been established in *Pure Oil Company*, 84 NLRB 315 and reaffirmed in *Interborough News Company*, 90 NLRB 2135, where it was held that "the *Pure Oil* principle does not turn on the existence of picketing. What is made controlling in that case is that the action induced and encouraged was confined to a refusal to perform services *only* at the premises of the primary employer—and that precisely was the situation here." (*Id.* at 2150, emphasis in original.) It is precisely the situation in the present case as well.

illegality under § 8(b)(4) on the basis of its view of the proper balance of the rights of primary and secondary unions, for this is not the test established by Congress. *Houston Contractors* v. *Labor Board,* 386 U.S. 684; *Cf. Labor Board* v. *Insurance Agents,* 361 U.S. 477, 497-498; *Labor Board* v. *Brown,* 380 U.S. 278, 283, 290-292; *American Ship Building Co.* v. *Labor Board,* 380 U.S. 300, 315-318. Moreover, as the facts of this case demonstrate, the Board is plainly wrong in its minor premise that there is a greater disruption of the neutral employer's business in the absence of a picket line. In either event the scope of lawful disruption attendant upon a primary strike is the same—all employees are free to withhold their services from the primary employer's normal day-to-day operations. The non-existence of a picket line neither aggravates that disruption nor deprives it of its character of primary activity.

The Court of Appeals recognized that the impact on the neutral employer was no greater than it would have been if a primary picket line had been established. But it concluded "that the Board is not directed by the statute to permit non-picketing appeals merely because the resulting secondary impact may be no different from that which may ensue from permissible picketing appeals." (P. 10a *infra.*) This conclusion was based on the Court's view that primary picketing is accorded special protection under the Act by virtue of the proviso to § 8(b)(4)(B) which was enacted in 1959. The Court correctly understood the proviso to have preserved the central holding of *National Labor Relations Board* v. *International Rice Milling Co.,* 341 U.S. 665, at the same time that one aspect of that decision was being overturned by the

removal of the word "concerted" from the inducement clause of § 8(b)(4). See *Labor Board* v. *Servette,* 377 U.S. 46, 52. However, the Court misconceived the *Rice Milling* Case, which was based not on the special status of picketing, but rather on § 13 of the Act which "made it clear that § 8(b)(4), and all other parts of the Act which otherwise might be read so as to interfere with, impede or diminish the union's traditional right to strike, may be so read only if such interference, impediment or diminution is 'specifically provided for' in the Act." 341 U.S. 665 at 673. Thus, protection was given to picketing in order to effectuate the Congressional objective to preserve the primary strike weapon, of which primary picketing is but one important aspect. *Cf. Labor Board* v. *Drivers Union,* 362 U.S. 274, 281-282. This was confirmed by the proviso to § 8(b)(4)(B), whose language protects "primary strikes" no less than "primary picketing." This Court squarely held in *Carrier* that "The primary strike, which is protected by the proviso, is aimed at applying economic pressure by halting the day-to-day operations of the struck employer." 376 U.S. at 499. Yet, the Court of Appeals treated the proviso not as declaratory of prior law, as Congress intended, but as a limitation of the normal incidents of all primary strikes by confining them to strikes which are attended by primary picketing. All the possible consequences of this novel interpretation cannot now be foreseen, but two are inevitable: 1) unions will be given additional incentive to post pickets at the primary situs, thereby increasing the risk that neutral employers will become involved in the dispute, as the Board dissenters recognized (JA 296-297), and contrary to the central purpose of § 8(b)(4); 2) wherever

the striking union does not or cannot engage in primary picketing, the right of unions and their members to undertake activity protected by § 13 and the proviso to § 8(b)(4)(B) will be severely inhibited, further upsetting the balance of forces prescribed by Congress.

The circumstance which disabled the SIU from picketing, and which ultimately resulted in Petitioner's liability under the Board's theory, was an injunction issued by an Illinois court. This points up a separate and substantial ground for review here. For the effect of the Board's new rule is to subvert the uniformity of regulation which the Act mandates. Notwithstanding the exclusive responsibility placed upon it by the Congress, the Board has ceded to state courts the decisive voice in determining legality of union activity under § 8(b)(4). Indeed, the Board asserted as a reason for its rule the need to preserve the efficacy of such state court injunctions.[8] But the Board is not charged with preventing evasion of the "effects" of state injunctions. Its exclusive responsibility is to determine the respective rights and duties of employers, employees and labor organizations under the National Labor Relations Act on the basis of standards prescribed by Congress. The Board's abdication of this function under the rule announced in this case subordinates federal law to the vagaries of state law despite the Congressional desire for uniformity consistently recognized by this Court since *Garner* v.

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[8] "Moreover, to permit such conduct on the theory that a 'phantom' or 'invisible' picket line is to be presumed even though there is no picket line in fact, would provide a ready device for evading the effects of an injunction prohibiting picketing that might be obtained against the primary union." JA 290.

Teamsters Union, 346 U.S. 485 and *Weber* v. *Anheuser-Busch*, 348 U.S. 468.[7]

Moreover, the decision below will encourage employers to seek state court injunctions against peaceful picketing in labor disputes affecting commerce in the hope that they may thereby obtain immunity from otherwise permissible primary activity. There is all too much evidence that state courts remain receptive to requests for injunctions in labor disputes, a tendency which can only be aggravated by the critical significance the decision below places on such injunctions. The decision below thus has a potentially devastating effect on the right to engage in primary strike activity

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[7] In evaluating the propriety of granting review of the decision below it seems highly significant that it would make it possible for every maritime state in this country to be operating under different Federal law of permissible strike activity. For example, let us assume that a ship docks to pick up grain at several ports, e.g., Chicago, Milwaukee, Toledo and Buffalo. In every instance the members of the Local ILA Union at the particular port refuse to board the ship because they are in sympathy with SIU in its dispute with the ship. In Chicago, an Illinois court enjoins all picketing. In Milwaukee the SIU persuades the court to allow a single picket. In Toledo the Ohio court denies the petition for an injunction entirely because of some novel Ohio doctrine of law. In Buffalo the employer secures the injunction banning all picketing but it is later reversed by a New York appellate court. Under the Board's majority position, *for engaging in identical conduct within the confines of the United States*, the Chicago local Union has violated Section 8(b)(4); the Milwaukee local's conduct is lawful because its attorney's efforts retained a solitary picket; the Toledo local's conduct is lawful because it is the beneficiary of a novel doctrine of Ohio law; the Buffalo union engaged in illegal conduct when its members refused to board the ship. Would the subsequent reversal of the injunction order require the Board to treat the New York longshoremen's actions as having been lawful by deeming the picket line to have been present even though in fact there was no picketing?

protected by § 13 and reaffirmed by the proviso to § 8 (b)(4)(B). This impact will not be alleviated by the fact that most of these injunctions are theoretically subject to reversal under the preemption doctrine.[8] Incredibly, the Board did not even inquire whether the injunction to which it accommodated its interpretation of § 8(b)(4)(B) was consistent with the National Labor Relations Act. Nor, in light of *Walker* v. *Birmingham*, 388 U.S. 307, can unions safely rely on *In Re Green*, 369 U.S. 689, to disobey an unconstitutional injunction. In short, unless the decision below is reversed, federally created rights will be subject to destruction by state court injunctions issued in disobedience to federal law. Even where the state courts act properly, the congressional desire for uniformity will be thwarted by predicating legality under § 8 (b)(4) upon the availability of state court injunctions. Only this Court can restore the balance of federalism which the National Labor Relations Act and, in the final analysis, the Supremacy Clause command.

The Board's construction of § 8(b)(4) requires review on the additional ground that it raises serious questions under the First Amendment. Cf. *Machinists* v. *Street*, 367 U.S. 740. It was acknowledged below that if the SIU had engaged in primary picketing, the ILA's appeals to its members and their subsequent refusals to aid the Continental's day-to-day operations would have been lawful. (See pp. 5a-7a, *infra*.) Under such circumstances, Government agencies cannot, consistent with the First Amendment, mandate the use of one form of expression in preference to another. By

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[8] As has long been recognized, the granting of an injunction often terminates a labor dispute. *Construction Laborers* v. *Curry*, 371 U.S. 542, 550; *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 307-308.

prohibiting oral appeals to employees not to perform certain services, while permitting identical appeals by picketing at the situs, the Board's interpretation transgresses the First Amendment. It has been squarely held that " * * * one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *Irvington,* 308 U.S. 141, 163.

Despite the many cases that have followed, this Court's statement in *Thornhill* v. *Alabama,* 310 U.S. 88, 102, that "the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution . . .," remains the law. That freedom is not without qualification, as where the utterances are part of an "integrated course of conduct" in violation of law, *Giboney* v. *Empire Storage,* 336 U.S. 490, 498 or where attended by violence, *Thornhill* v. *Alabama, supra,* at page 105. But where the utterance itself is lawful and is made peacefully, First Amendment guarantees attach. As was held in *Carlson* v. *California,* 310 U.S. 106, 112:

> "The carrying of signs and banners, no less than the raising of a flag, is a natural and appropriate means of conveying information on matters of public concern. For the reasons set forth in our opinion in *Thornhill* v. *Alabama, supra,* publicizing the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth or by banner, must now be regarded as within that liberty of communication which is secured to every person by the Fourteenth Amendment against abridgment by a state." (citations omitted)

Justice Black has recently stated in a similar situation, ". . . it is difficult to see that the section in question intends to do anything but prevent dissemination of information about the facts of a labor dispute—a right protected by the First Amendment." *Labor Board* v. *Fruit Packers*, 377 U.S. 58, 78 (concurring opinion). He rejected the view that one form of speech can be restricted because other methods of communication are left open. "This reason for abridgment strikes me as being on a par with holding that governmental suppression of a newspaper in a city would not violate the First Amendment because there continues to be radio and television stations. First Amendment freedoms can no more validly be taken by degrees than by one fell swoop." 377 U.S. at 79-80. Here the Board has established a rule predicating legality on the mode of communication and not on any invitation of illegal conduct. The Act does not authorize, and the Constitution forbids, such a rule.

II. The Court Below Has Substantially Departed From the Established Standards of Judicial Review of Agency Action

We have thus far urged that *certiorari* be granted because the rule of law established by the Board and approved below is contrary to this Court's decisions and undermines the policies of the Act. An additional compelling ground for review is presented by the *method* of decision, that is, the establishment of a *per se* rule of illegality, and its application in this case. We submit that in sustaining the Board's order, the Court of Appeals has so far departed from long established standards of judicial review of agency action as to call for the exercise of this Court's supervisory powers over the lower Federal courts.

As we have seen, the theory underlying the rule established by the Board in this case is that unless clear and contemporary notice is given by the striking union that the dispute is between it and the primary employer, "the dispute takes on the appearance and character of a dispute between the 'inducing' union and the neutral employer over the latter's dealings with the primary employer rather than of a dispute between the primary union and the primary employer." For this reason, the Board holds that in the absence of such clear and contemporary notice, it will conclusively infer an unlawful objective on the part of a union inducing strike action at the primary situs, at least if the inducement is by a "secondary union". As the facts of this case show, and as the Board and the Court of Appeals acknowledged, this inference cannot be rebutted by a showing that the only activity invited or engaged in is a refusal to aid the primary employer in his day-to-day operations, which would concededly be protected activity if a primary picket were present. But the Board may not substitute, "inferences as to the lawfulness or unlawfulness of an objective, based purely on its own judgment as to the propriety and adequacy of the means employed in a labor dispute, for the sole statutory test of unlawfulness of the end or objective sought, contrary to the Supreme Court's pronouncements * * *" *Labor Board* v. *General Drivers Local 968*, 225 F. 2d 205, 209. By sustaining an order which rested only upon an inference of illegality rather than "substantial evidence that the unlawful objective denounced by the statute actually existed" (*id.*), the Court below adopted a standard of review that is contrary not only to that proclaimed by Judge Rives for the Fifth Circuit in

the cited case, but, also of course, to the decisions of this Court. See, e.g. *General Electric, supra,* 366 U.S. 667 at 672-674 and 677; *Labor Board* v. *Insurance Agents,* 361 U.S. 477, particularly at 482-484, nn. 4 and 5; *Teamsters Local* v. *Labor Board,* 365 U.S. 667; *Labor Board* v. *Brown,* 380 U.S. 278. In *Brown,* this Court concluded, in language that precisely fits the present case, "Congress has not given the Board untrammeled authority to catalogue which economic devices shall be deemed freighted with indicia of unlawful intent." Id. at 292.

The Court further misconceived its function by holding that the Board could properly adopt a rule requiring notice and yet find a violation without determining whether notice actually existed. For, as petitioners urged, and the Court acknowledged:

> "* * * although there was no notice by virtue of picketing on the scene, there was notice in fact to all parties concerned that Upper Lakes and not Continental was the target of the work stoppages; and the work stoppage that actually resulted was confined to operations impinging on Upper Lakes." p. 12a, *infra.*

The Court of Appeals declared, with considerable justification, that "It is unfortunate that the Board's opinion does not expressly deal with petitioner's point." p. 12a. Nevertheless, it enforced the Board's order. The Court thought that "a fair reading of the opinion reveals that the Board evolved a general requirement in terms of likelihood of providing adequate notice, intending it to apply without regard to whether the particular case reflected actual notice provided in some

other way." p. 12a-13a, *infra*.[9] This process of decision was justified by the Court of Appeals by resort to a novel and exaggerated conception of agency authority:

> "It seems to us permissible for an agency—like a legislature or court—to devise a rule setting forth certain conditions or requirements on the ground that these will be necessary in most instances to achieve a desired goal, without having to consider for every single situation whether they are necessary for that case." p. 13a, *infra*.

When the Board previously asserted power to establish a rule of the precise character envisioned by the Court of Appeals in the quoted passage, this Court disabused the Board of its pretentions to legislative powers. *Teamsters Local* v. *Labor Board*, 365 U.S. 667.[10]

> "The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which

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[9] Perhaps a more accurate, albeit less charitable reading of its opinion would be that the Board simply failed to reconcile its rule of law with the facts in this case. In any event, it was not appropriate for the Court below to speculate what the Board meant on an issue which the Court acknowledged to be "of obvious importance". p. 12a, *infra*.

"For the courts to substitute their or counsel's discretion for that of the Commission is incompatible with the orderly functioning of the process of judicial review." *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 169. See also *Phelps Dodge Corp.* v. *Labor Board*, 313 U.S. 177, 197; *S.E.C.* v. *Chenery Corp.*, 318 U.S. 80, 94; 332 U.S. 194, 196; *Labor Board* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438, 442-444.

[10] In *Mountain Pacific Chapter*, 119 NLRB 883, the Board devised three conditions for the lawful operation of exclusive hiring halls. The Board asserted that in the absence of these "protective provisions", there was a considerable likelihood that exclusive hiring halls would be used to discriminate to encourage union membership

results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *American Ship Building* v. *Labor Board,* 380 U.S. 300, 318.

The policy decisions governing the present case have already been made by the legislature. "Congress has been rather specific when it has come to outlaw particular economic weapons on the part of unions." *Labor Board* v. *Insurance Agents,* 361 U.S. 477, 498, referring to § 8(b)(4) of the Act, and quoted with approval in *Labor Board* v. *Drivers Local Union,* 362 U.S. 274 at 282-283. Section 8(b)(4) "comprehensively and with great particularity 'circumscribes and condemns specific union conduct directed to specific objectives' ".[11]

The National Labor Relations Board has created a rule of law which substitutes a conclusive presumption of illegality from failure to comply with certain Board-ordained conditions for record evidence of the elements of the offense defined by Congress. The Court of Appeals has endorsed this rule, and enforced an order based upon it, although it conceded that the

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in violation of § 8(a)(3). The Board held that it would find a violation of the Act whenever these three conditions were not met, even if there was no showing that they were necessary to prevent actual discrimination in a given case. When the legality of the *Mountain Pacific* standards came before this Court in *Teamsters Local* v. *Labor Board,* 365 U.S. 667, this Court expressly disapproved them. The Court did not allow the Board to substitute its rule for the finding of discrimination which Congress had made the statutory test. "If hiring halls are to be subjected to regulation that is less selective and more pervasive, Congress not the Board is the agency to do it." 365 U.S. at 677.

[11] *Teamsters Union* v. *Morton,* 377 U.S. 252, 258, quoting *Carpenters' Union* v. *Labor Board,* 357 U.S. 93, 98.

Board failed to consider whether the asserted reason for the rule is present in this case. The Court has thus condoned illegal and arbitrary action by the Board, in derogation of its own responsibilities under § 10(e) of the Act. *Labor Board* v. *Brown,* 380 U.S. 278, 290-292. Even more significantly, the Court has enunciated a principle of general application which equates the powers of the Congress and administrative agencies and drastically attenuates the obligation of the judiciary to confine the agencies to their assigned roles and to assure consistency with the statutory mandate. Since the judgment below unavoidably rests on this far-reaching and dangerous doctrine, review by this Court is necessary to restore the hitherto accepted relationship between Congress, administrative agencies and the courts.

CONCLUSION

By reason of the foregoing, this Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,754

GRAIN ELEVATOR, FLOUR AND FEED MILL WORKERS, INTERNATIONAL LONGSHOREMEN ASSOCIATION, LOCAL 418, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

On Petition to Review and Set Aside and on Cross-Petition to enforce an Order of the National Labor Relations Board

Decided March 31, 1967

Before DANAHER, BURGER and LEVENTHAL, *Circuit Judges.*

LEVENTHAL, *Circuit Judge:* This case involves the secondary boycott provisions of section 8 of the National Labor Relations Act and whether certain conduct by the petitioning union was unlawful secondary activity or a protected incident of a primary strike.[1]

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[1] The secondary boycott provisions, 29 U.S.C. 158(b)(4) (1964), state in pertinent part:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
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> ....
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> (4)(i) . . . to induce or encourage any individual employed by any person engaged in commerce . . . to engage in, a strike or a refusal in the course of his employment . . . to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce . . ., where in either case an object thereof is—
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> ....
>
> (B) forcing or requiring any person to cease . . . doing business with any other person . . .: *Provided,* That nothing contined in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

The primary labor dispute concerns an employer, Upper Lakes Shipping, Ltd. (Upper Lakes), and union, Seafarers' International Union of Canada (SIU), that are Canadian entities. The secondary employer, Continental Grain Company (Continental), is a grain shipper using Upper Lakes ships. Continental is based in the United States, as is the secondary union representing some of Continental's employees, Grain Elevator, Flour and Feed Mill Workers, International Longshoremen Association, Local 418, AFL-CIO (Local 418). Local 418, the petitioner, seeks review of the Board's order holding its conduct an unfair labor practice, and the Board has cross-petitioned for enforcement of its order.

SIU, seeking support in its labor dispute with Upper Lakes, endeavored to stop the loading of Continental's grain on Upper Lakes' ships. When the ships arrived for loading alongside Continental's grain elevators at Calumet Harbor in Chicago, SIU picketed and the members of Local 418 refused to load. Continental obtained a state court order enjoining the picketing. Subsequent Upper Lakes ships arrived, but Local 418 members continued to refuse to load despite the absence of picketing. Continental filed an unfair labor practice charge with the National Labor Relations Board alleging that Local 418 had induced its members not to load the Upper Lakes ships with an object of forcing Continental to cease dealing with Upper Lakes. The Board obtained a temporary restraining order pursuant to Section 10(1) of the Act, barring Local 418 from inducing its members not to load the Upper Lakes ships. Subsequent ships arrived but Local 418 members still refused to load. On the Board's civil contempt petition, Local 418 was found in contempt of the injunction, and the Seventh Circuit affirmed.[3] When

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[3] Madden v. Grain Elevator Workers Local 418, 334 F. 2d 1014 (7th Cir. 1964), *cert. denied*, 379 U.S. 967 (1965).

the unfair labor practice case came before the Board on the merits, it found that Local 418 not only had induced its members not to load the Upper Lakes ships but also had threatened Continental with wider work stoppages, and that these activities had been done with the object of forcing Continental to cease dealing with Upper Lakes.[3] Twe members dissented.

Petitioner contends that the Board lacked jurisdiction because the subject matter of the primary dispute involves the internal affairs of parties based in Canada. The short answer is that the Board is not here exercising jurisdiction over the Canadian primary dispute, but over secondary activity in this country, "directed against an American employer by an American labor organization and involving employees working in a domestic plant of the American employer."[4]

The Board's findings cannot be successfully undermined on the ground that the secondary employees had acted individually in deciding to avoid the struck ship. The substantial evidence of record supporting the Board's findings includes the following: High officials of the Inter-

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[3] Grain Elevator Workers Local 418 *and* Continental Grain Co., 155 NLRB No. 45 (Oct. 29, 1965). At the time of filing its charge with the Board against Local 418, Continental made the same charge against Seafarers' International Union of North America (SIUNA), the United States based parent organization of SIU. As with Local 418 the charge resulted in an unfair labor practice complaint, but the Board later dismissed the SIUNA complaint, concluding that regardless of whether SIU had acted lawfully in seeking the support of Local 418, SIUNA could not be held responsible for the acts of its autonomous affiliate.

[4] Madden v. Grain Elevator Workers Local 418, *supra* note 2 at 1019. That opinion sufficiently demonstrates the inapplicability to the controversy before the Board of the Supreme Court's decision in Incres S.S. Co. v. Maritime Workers, 372 U.S. 24 (1963), upon which petitioner relies.

national Longshoremen Association frequently declared it to be ILA policy to support SIU in its dispute with Upper Lakes. The president of Local 418 repeatedly told Continental that the Local was committed to assist SIU, that it considered there to be an "invisible picket line" around the Upper Lakes ships, and that grain would not be loaded on those ships. The same Local officials who had participated in the formulation of the ILA policy not to load Upper Lakes ships were present at Continental's docks at the time the Local members refused to load, and the officials conducted closed door meetings with the members just prior to their refusals. One Local member when ordered by Continental to load stated that he was sorry but he was afraid to load. The Local president told Continental's vice president that if Continental persisted in its attempt to load Upper Lakes ships, it would have trouble at its Texas elevators.

The Board's findings place petitioner's conduct squarely within the prohibitory language of the Act's secondary boycott ban. The question becomes whether this conduct is taken out of the ban by the reach of the Act's expressed exception for primary strikes or primary picketing.[5] The Board resolved this question by formulating and applying a rule that may fairly be restated as follows: In the situation where the situs of the primary dispute is movable and is located temporarily at the premises of a secondary employer, there must be lawful on the scene of picketing by the primary union in order for the exception to be applicable to justify non-picketing appeals by the secondary union to its members for a work stoppage in support of the

[5] See footnote 1, *supra*.

primary union.[6] Since the present case involves a movable primary situs that had moved next to the premises of a neutral employer and since there was no lawful on the

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[6] Pertinent portions of the Board's opinion, Grain Elevator Workers Local 418 *and* Continental Grain Co., *supra* note 3 at 12-15, are set out below:

> At least in a case such as this one, where the labor dispute is between a primary employer with an ambulatory situs and a union other than the one which seeks to induce secondary employees to take action because of that dispute, there must be some clear and contemporary notice given by the primary union to the employees appealed to, and to the neutral employer at whose premises the dispute becomes active, that the labor dispute involved is between it and the primary employer. Unless such notice is given, the dispute takes on the appearance and character of a dispute between the "inducing" union and the neutral employer over the latter's dealings with the primary employer rather than of a dispute between the primary union and the primary employer.
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> In cases involving picketing of an ambulatory situs temporarily located at a neutral employer's premises, the Board, in recognition of the fact that
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> > . . . picketing which induces secondary employees to respect a picket line is not the equivalent of picketing which has an object of inducing those employees to engage in concerted conduct against their own employer in order to force him to refuse to deal with the struck employer . . . .
>
> applies the *Moore Dry Dock* tests, to determine whether the picketing has one or the other of these objects. These tests require, in effect, that the picketing union give notice to the neutral employer's employees, as well as to all other employees who have business with the neutral employer, that its dispute is with the primary, not the neutral employer. Though these tests impose some limitation on the union's freedom to picket the primary employer, they nevertheless do protect its right, and the right of other unions who would aid its cause, to appeal to all employees approaching the picket line to extend the union member's traditional gesture of support to the primary union, namely a refusal to cross its lawful picket line in order not to contribute to the operations the picket line is endeavoring to halt, while at the same time they protect the

scene picketing by SIU at the time Local 418 was found to have been making appeals to its members not to load Upper Lakes ships, application of the Board's rule rendered unlawful such appeals by Local 418.[7]

Petitioner contends that its conduct is within the "primary activity" exception to the prohibition bacause it resulted in no more than has already been held permissible under the exception under decisions of the Supreme Court —namely an appeal by primary employees to secondary

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neutral employer, at whose premises the dispute is located, from becoming an object of secondary pressure.

The underlying considerations that lead the Board in ambulatory situs situations to infer an unlawful objective when picketing deviates from *Moore Dry Dock* standards also dictate a like inference where pressures are exerted against the neutral employees by a secondary union in th absence of a picket line directed at the primary employer while the situs of the dispute is lodged at the neutral premises. A failure to draw an inference of illegality in such circumstances would give, it seems to us, greater freedom to secondary unions to disrupt the business of the neutral employer whose premises temporarily house the primary ambulatory situs, than is given under our *Moore Dry Dock* tests to the primary union directly involved. Moreover, to permit such conduct on the theory that a "phantom" or "invisible" picket line is to be presumed even though there is no picket line in fact, would provide a ready device for evading the effects of an injunction prohibiting picketing that might be obtained against the primary union. It would also destroy the careful balance now existing between the right of the primary union, and those unions who would take up its cause, to appeal to employees approaching struck "ambulatory" premises to refrain from entering those premises, and the right of neutral employers to remain free from pressures directed toward forcing them to cease dealing with the primary employer. (Footnotes omitted.)

[7] In affirming the rulings holding Local 418 in violation of the 10(1) injunction, the Seventh Circuit stated that the Local's conduct was also in violation of the Act's secondary boycott provisions, on the ground that the work stoppages induced occurred at the premises of the secondary employer. Madden v. Grain Elevator Workers Local 418, *supra* note 2 at 1020. This was not the basis of the Board's decision, and hence is not before us.

employees that does not contemplate complete cessation of the operations of the neutral employer but only cessation of those tasks of the neutral employees, such as deliveries to the primary employer, that aid the day-to-day operations of the primary employer. *Local 761, IUE* v. *NLRB (General Electric)*, 366 U.S. 667, 680-81 (1961); *United Steelworkers* v. *NLRB (Carrier Corp.)*, 376 U.S. 492, 498-99 (1964). These decision do indeed countenance a direct appeal to secondary employees in the form of picketing conducted by primary employees, at least at a situs "proximate and related to the [primary] employer's day-to-day operations." *Carrier Corp., supra* at 500. We may assume, at least for purposes of discussion, that the same test applies when picketing against a primary employer is conducted at the main premises of the neutral employer where that is as close as possible to the situs of the primary dispute, *e.g.*, where the primary employer's premises are ambulatory.[8] There is difficulty, however, in

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[8] There is more difference in doctrine than in results between the Supreme Court's approach and this court's opinion in Seafarers International Union v. NLRB (Salt Dome Production Co.), 105 U.S. App. D.C. 211, 265 F. 2d 585 (1959). This court reviewed a Board order enjoining picketing by primary employees (of Salt Dome) conducted at the premises of Todd Shipyards where Salt Dome's vessel was under repair. The case arose prior to the 1959 amendment. The court stated that the issue was whether the effect on Todd's workers was "an objective" or merely "an incident" of the actions of the primary employees; that the "hope" of the primary employees for support of Todd workers did not constitute that support "the objective of their actions." We need not consider whether these concepts survive the Supreme Court decisions cited in the text. We call attention to factors, other than these concepts, which are emphasized in the opinion of Judge Prettyman—that the picketing "was as close as possible to the situs of the dispute," and that it in no way related to any of Todd's activities other than those of servicing the primary employer. "We do not view the acts of the Union as evidencing an objective to affect Todd any more than any picket line might affect a servicer or supplier of the picketed employer." These factors relied upon to underscore lack of impermissible "objective" are manifestly interrelated with the ingredients of the Supreme Court's decisions.

concluding that petitioner's activities are permissible merely because their impact in this case was no greater than what might have been attainable under the decisions as a consequence of picketing by primary employees.

There is a significant difference between the two issues, one whether picketing by primary employees is primary picketing, the other whether the secondary appeal is within the proviso in the absence of picketing by the primary employees. The Act by its specific terms excepts from the secondary boycott prohibitions only primary strikes and primary picketing. Petitioner in effect urges the Court to stretch the expressed terms of the proviso so as to exempt any secondary work stoppage appeal which is incident to a primary strike and is limited to the impact that would be permissible if a consequence of primary picketing. Our consideration of the development of the secondary boycott legislation, however, uncovers no basis for concluding that the primary proviso requires exemption from the general secondary boycott prohibition for any activities other than those specifically named in the exception.

The secondary boycott ban originated in 1947 as part of the Taft-Hartley amendments and was "to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be strick between the uncontrolled power of management and labor to further their respective interests."[9] In interpreting the statute the courts worked out a way of saving primary picketing from the ban.[10] This result was approved by

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[9] Local 1976, United Bhd. of Carpenters v. NLRB, 357 U.S. 93, 99-100 (1958).

[10] NLRB v. International Rice Milling Co., 341 U.S. 665, 670-71 (1951).

Congress when it made clear by express proviso that the rules establishing an exception for primary strikes and primary picketing were not being curtailed by the other 1959 amendments broadening the secondary boycott prohibition (in ways not here material) to its present form (see note 1).

The proviso reflects the concern of the legislators to preserve for unions the use of their historic weapons of primary strike and primary picketing, even though these realistically represent a form of inducement of secondary work stoppage when coupled with labor's tradition that secondary employees do not enter struck premises or cross picket lines. Congress' concern was not, however, to sanction a limited amount of impact no matter what the form of inducement. The analysis of the key legislators makes it clear that the Congressional focus was on the protection of labor's traditional means of conducting labor disputes, and was not an effort to insure that labor could have in all situations the same kind and extent of impact that it could obtain in some cases through those traditional means. The Congressional spokesmen considered an express proviso for primary activity to be necessary because if the 1959 House bill, which broadened the prohibitory language, were passed without this proviso—

> . . . the pickets who appealed to a truckdriver not to enter the plant where men were striking for higher wages could be held guilty of an unfair labor practice.
>
> Of course, if this is true of one picket line, it is true of every picket line, for picket line appeals to the employees of other employers not to enter the plant. The legality of every picket line would be cast in doubt.
>
> It is not clear whether the House bill is intended to have this consequence. If that is the intent, there is a major difference between the House and Senate

> on which the Senate could not yield. If the consequence is unintended, this provision of the House bill must be redrafted.[11]

We conclude that the Board is not directed by the statute to permit non-picketing appeals merely because the resulting secondary impact may be no different from that which may ensue from permissible picketing appeals.[12] In short, Congressional approval of a union's use of a particular time-honored means, notwithstanding possibility of certain practical consequences, does not constitute a warrant to reach for the same or equivalent consequences regardless of means used.

We need not here consider whether the Act's secondary boycott provisions may be enforced so as to bar all second-

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[11] Kennedy-Thompson Analysis, 105 Cong. Rec. 16588, 16589, 2 NLRB Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, 1706, 1707 (1959).

[12] Similarly, we are not persuaded by petitioner's challenge to the Board's rule on the ground that it makes the availability of limited secondary pressure for implementing a primary strike depend on whether in a given fact situation picketing is permissible under state law, a matter which will vary from state to state. Such a result is unreasonable only if the 1959 intendment of Congress is divined to be the sanctioning of limited secondary pressure no matter what the form of inducement. As indicated above, we find no basis for such an inference in either the language or history of the 1959 legislation. When the secondary boycott prohibition was shaped so as to carve out the right of primary picketing, and the limited secondary pressure obtainable thereby, Congress was presumably aware of the elementary concept that the availability of this right would be subject to definition and controls under state law. Where primary picketing exists, the Federal exception is not rendered inapplicable merely because the picketing could have been subject to a decree of invalidity under state law. United Steelworkers v. NLRB (Carrier Corp.), *supra* at 501-502. However, where there is no primary picketing—whether this is due to the inclination of the primary employees or the fetters placed on them by state law—the condition precedent to the Federal proviso is missing, and that exception cannot be invoked.

ary work stoppage appeals that are unaccompanied by primary picketing. The Board has not gone that far. It has said only that non-picketing appeals are unprotected in the situation where a movable primary situs has moved next to the premises of the secondary employer and the appeals are made by the secondary union in the absence of lawful on the scene picketing by the primary union.[13] Prohibiting such appeals by secondary unions is not only consistent with the expressed terms of the Act, it also seems to us highly reasonable in terms of protecting the neutral employer from potential disruption inherent in the situation. As the Board states in its opinion,[14] unless there is some clear and contemporaneous notice that it is the primary employer and not the neutral employer who is the cause of the work stoppages by the secondary employees, the work stoppages might lead outside parties having business with the neutral employer to think he is directly involved in the dispute and accordingly to cease dealing with him. By requiring that there be lawful on the scene picketing by the primary union as a precondition to the lawfulness of appeals by the secondary union, the Board has fashioned a rule generally calculated to insulate neutral employers from this broader type of secondary impact.[15]

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[13] Petitioner, like the dissenting members of the Board, rests its claim of right on the contention that it is a corollary of the asserted right of the primary union to make its non-picketing appeal for support to the secondary employees and their union. The Board did not expressly decide whether the primary union has that right. We think the Board's latitude permitted reservation of that question while deciding that a picketing requirement governs resolution of the type of situation and interests involved in this case.

[14] See footnote 6, *supra*.

[15] For picketing to be lawful in a movable situs situation, the picketing must clearly indicate that the dispute is with the primary employer. Sailors' Union *and* Moore Dry Dock Co., 92 NLRB 547, 549 (1950).

Petitioner argues along the lines of the opinion of the dissenting members, that the Board's picketing requirement rule is unsound, on the ground that the presence of picketing, rather than protecting the neutral employer, may turn out to heighten the disruption experienced by the neutral employer. Apparently the argument is that outside parties, who would not be deterred from dealing with the neutral by limited work stoppages of the neutral employees, would be deterred by picketing even though the picketing specified the primary employer as the target. It is at least doubtful whether the recent Supreme Court decisions would sustain picketing that resulted in a cessation of work for the neutral employer that was not related to the daily operations of the primary employer. In any event, it is a question of policy for Board resolution whether the neutral employer will be better protected by requiring picketing, with the concomitant notice that the neutral is not the picket's foe, or by dispensing with a picketing requirement. We cannot say in the abstract that the Board's rule is so unreasonable as to constitute an abuse of permissible administrative latitude.

Petitioner moves on to argue that it was improper for the Board to apply its rule in this case because it does not satisfy the factual predicate or assumption that was the basis for the Board's rule. In this case, says petitioner, although there was no notice by virtue of picketing on the scene, there was notice in fact to all parties concerned that Upper Lakes and not Continental was the target of the work stoppages; and the work stoppage that actually resulted was confined to operations impinging on Upper Lakes. It is unfortunate that the Board's opinion does not expressly deal with petitioner's point. While an agency is not required to dilate on every contention raised by the parties, the one involved here is of obvious importance and is urged to affect the soundness and substance of the doctrine fashioned by the Board. However, we think a fair reading of the opinion reveals that the Board

evolved a general requirement in terms of likelihood of providing adequate notice, intending it to apply without regard to whether the particular case reflected actual notice provided in some other way. In insisting on strict adherence to its primary picketing conditions (the so-called Moore Dry Dock tests), the Board pointed out that these provide notice to the employees of the neutral employer "as well as to all other employees who have business with the neutral employer." The Board could properly adopt a rule that would assure general and adequate notice, and avoid a doctrine that would require it to determine in each case all the employees that might have occasion to visit the plant and whether they do or would have adequate notice of the labor situation. It seems to us permissible for an agency—like a legislature or court—to devise a rule setting forth certain conditions or requirements on the ground that these will be necessary in most instances to achieve a desired goal, without having to consider for every single situation whether they are necessary for that case.

We repeat that neither the Board nor this court is holding that primary picketing is a necessary condition in all cases. The statutory exception refers to "any primary strike or primary picketing." The underlying doctrine contemplates that the union engaged in a primary strike is "free to use persuasion, including picketing."[16] By implication there may be, in some cases at least, valid persuasion other than by picketing. The Supreme Court has made clear, however, that in applying the statute the Board may devise reasonable criteria in light of the means used by the union in promoting its case, and may shape and adjust these criteria in the light of its experience and understanding of the unfolding variant situa-

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[16] Local 761, IUE v. NLRB (General Electric), *supra* at 672, quoting NLRB v. Teamsters Local 294, 284 F. 2d 887, 889 (2d Cir. 1960).

tions. The Board is aware of the need for a balance between on the one hand the union's right of primary activity, including the need for appeals to neutral employees whose tasks and the everyday operations of the primary employer, and on the other hand the right of neutral employers to a limitation on the pressures thrust on them in labor controversies not their own. The courts of appeals do not have a primary responsibility but rather a limited review to ensure that the Board acts rationally, without violating ascertainable legislative intent, and upon the basis of substantial evidence. *Local 761, IUE* v. *NLRB (General Electric), supra* at 672 ff.; *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951). We have considered contentions raised with respect to the evidence[17] and objections to alleged departures from earlier Board

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[17] Petitioner at argument stressed the fact that full loading would have required at least one of the secondary employees to board the ship, but we have here more than a refusal to enter upon struck premises.

In this case the petitioner's activities also included threats of action elsewhere and also induced a stoppage of a range of activities at the plant of the neutral employer. The men did preliminary work, including placing the grain in the shipping bins, but refused to raise the shipping spouts, throw ropes on board the ship, and release grain through the spouts.

Petitioner does not argue that the case merely involves the proviso to § 8(b)(4) that provides that "nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer" whose employees are engaged in a strike approved by a union entitled to recognition by the employer under the Act. We need not consider whether or in what circumstances a secondary union has the right to appeal to its members to exercise the rights assured by this proviso. As already noted the employees refused to do certain work on Continental's premises. We also need not consider whether this proviso is inherently unavailable where both primary union and primary employer are Canadian.

precedents,[18] but are satisfied they do not warrant judicial interposition.[19]

Local 418's petition for review of the Board's order is denied. The Board's petition for enforcement of its order is granted.

So ordered.

APPENDIX B

The relevant provisions of the National Labor Relations Act as amended, 49 Stat. 449, *et. seq.*, 61 Stat. 136, *et. seq.*, 29 U.S.C. § 151 *et. seq.*, are as follows:

> Section 7. "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activi-

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[18] Petitioner invoked certain Board decisions prior to 1959 which allowed non-picketing appeals to secondary employees. Oil Workers Local 346 *and* Pure Oil Co., 84 NLRB 315, 319 (1949); Newspaper Deliverers' Union *and* Interborough News Co., 90 NLRB 2135, 2149-50 (1950); Sailors' Union *and* Moore Dry Dock Co., *supra* note 15 at 551-52. The Board's decision discussed those precedents and distinguished them as not involving the combination of factors present in this case. *E.g.*, in *Interborough News*, the Board allowed non-picketing appeals to secondary employees not to deliver newspapers to the struck primary employer who ran newspaper stands inside subway stations. The Board pointed out in the case now on review that the appeals approved in *Interborough News* were by a primary union, in implementation of its permissible picket line activity at fixed primary premises. The fact that the picketing took place at less than all of the subway station entrances does not undercut the Board's distinction.

[19] See Newcastle Airport Comm'n v. CAB, —— U.S. App. D.C. ——, 371 F. 2d 733 (1966).

ties except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

Section 8(b)(4)(B). It shall be an unfair labor practice for a labor organization or its agents—

* * *

(4)(i) to engage in, or to induce, or encourage any individual employer by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services or (ii) to threaten, coerce or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * *

(B) Forcing or requiring any person to cease using, selling, handling, transporting or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; . . ."

* * *

Section 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as to either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 545

GRAIN ELEVATOR, FLOUR AND FEED MILL WORKERS, INTERNATIONAL LONGSHOREMEN ASSOCIATION, LOCAL 418, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–15a) is reported at 376 F. 2d 774. The Board's decision and order (J.A. 243–299)[1] are reported at 155 N.L.R.B. 402.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1967 (Pet. App. 1a). On June 28, 1967, Mr. Justice Brennan extended the time for filing a

[1] "J.A." refers to the portion of the record printed as a joint appendix to the briefs in the court below.

petition for a writ of certiorari until August 28, 1967, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are printed in Appendix B to the petition (Pet. App. 15a–16a).

QUESTION PRESENTED

In response to appeals by a union engaged in a labor dispute with a shipping company, a second union, representing the employees of a neutral employer, induced those employees to refuse to load a vessel operated by the shipping company when that vessel docked at the neutral's premises. The question presented is whether, in the particular circumstances of the case, the Board could reasonably conclude that the pressure exerted by the second union against the neutral employer exceeded the bounds of legitimate primary activity and violated Section 8(b)(4)(B) of the National Labor Relations Act.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

Continental Grain Company—a large domestic corporation engaged in buying and selling grain in the United States and abroad—maintains five elevators at Calumet Harbor, Chicago, for receiving and loading grain from and onto boxcars, barges and ships (J.A. 245–246, 277; 16, 18, 97–99). Petitioner (Local 418) represents the employees at two of these eleva-

tors. The employees are members of the union (J.A. 25, 65-66, 98, 159).

From its Chicago facility, Continental ships grain through the St. Lawrence Seaway to Canadian ports for transshipment to Europe and elsewhere. After the Seaway opened, Continental entered into an arrangement with Upper Lakes, Ltd., a Canadian corporation, whereby Continental obtained the use of Upper Lakes' storage facilities on the St. Lawrence River, and agreed in return to use Upper Lakes' ships to transport all grain destined for those facilities (J.A. 277-279; 20-22, 110-115, 232-234).

During the 1962-1963 shipping seasons,[2] Upper Lakes was engaged in a labor dispute in Canada with the Seafarers' International Union of Canada (hereinafter "SIU") (J.A. 247). Shortly before the opening of the 1962 season, officials of Local 418—which was not a party to this dispute—advised Continental's management that Upper Lakes ships would be picketed by SIU when they arrived at the Chicago elevators and that there would be trouble loading those ships because Local 418 was going to support SIU (J.A. 290, n. 34, 247-248; 31-33, 128-129, 133, 235). On about May 15, 1962, when an Upper Lakes vessel arrived at Continental's Calumet Harbor facility, SIU pickets appeared and Continental's employees refused to load the vessel. Shortly thereafter a State court enjoined the picketing and the vessel was loaded. (J.A. 248, 33-34, 133-135.) However, when

[2] The shipping season on the Great Lakes normally opens in mid-April and closes in late November or early December (J.A. 27).

another Upper Lakes ship subsequently arrived at Chicago, it was not loaded, notwithstanding the absence of picketing, because Local 418's president took the position "there is an invisible picket line around these ships" (J.A. 248, 35). A 30-day truce was eventually arranged by Secretary of Labor Goldberg, but, thereafter, at least one ship operated by Upper Lakes was not loaded and left Chicago empty (J.A. 249, 36–39, 44–45, 135–138).[1]

With the dispute between Upper Lakes and SIU unresolved, an official of Continental called President Conner of Local 418 before the start of the 1963 shipping season and asked whether he would "be helpful in seeing that these boats [were] loaded" during the approaching season. Conner replied that "we again are going to support the SIU" because the situation would be "the same as it was" in 1962. Since Continental had had no trouble loading "other ships" in 1962, Conner suggested that, if Continental used "other ships" in 1963, it would similarly encounter "no difficulty." (J.A. 250; 24–27.) Subsequently, in March and April of 1963, Conner advised Continental's officials that SIU had again asked Local 418 and other unions for support in its dispute with Upper Lakes and that Local 418 would continue to give that support (J.A. 283, 251; 48–50, 154–156).

Shortly before April 21, 1963, when the *S.S. Shaw*, an Upper Lakes vessel, was due to arrive at Chicago, a Continental representative contacted Conner to re-

[1] Petitioner's conduct in 1962 was not the basis for any unfair labor practice finding by the Board, but it was considered to be meaningful background to the events which occurred in 1963.

quest his help in getting the *Shaw* loaded. Conner refused, stating that Local 418 was committed to assist SIU and that he would not ask his men to load even if there was no picketing by SIU. Conner further advised that if Continental persisted in its attempts to load Upper Lakes ships it would have trouble getting railroad boxcars in and out of its facilities, since the SIU had the full cooperation of the American Brotherhood of Trainmen (J.A. 282, 252; 52–54). On May 21, Continental made two attempts to load the *Shaw*, but Continental's employees refused as a group to do so (J.A. 252–253; 54–55, 142–143, 152, 185–187). Later that day, Conner told a Continental official that if Continental persisted in its attempts to load Upper Lakes ships it would have "difficulty" at its Texas elevators (J.A. 253; 55).

Continental filed a charge with the Board that Local 418 had violated Section 8(b)(4)(B) of the Act by inducing Continental's employees to refuse to load ships operated by Upper Lakes (J.A. 243; 222–224). On May 29 the Board's Regional Director, pursuant to Section 10(*l*) of the Act, obtained a temporary restraining order against petitioner from the U.S. District Court for the Northern District of Illinois (J.A. 236–238). Local 418 did not comply with this order or with the injunction subsequently issued by the district court, and Continental's employees continued to refuse to load the *Shaw* (J.A. 253–256; 64–79, 163, 165–166, 193–195). As a result, the district court, on petition of the Board, found Local 418 in civil contempt of its orders and imposed fines. On appeal, the Seventh Circuit affirmed the action of the

district court, *Madden v. Grain Elevator, Flour and Feed Mill Workers, I.L.A., Local 418 and SIUNA*, 334 F. 2d 1014, certiorari denied, 379 U.S. 967.

B. THE DECISIONS OF THE BOARD AND THE COURT OF APPEALS

The Board (with two members dissenting) concluded, as had its Trial Examiner, that Local 418 had induced Continental's employees to refuse to perform services for their employer and had threatened Continental officials with an object of forcing Continental to cease doing business with Upper Lakes, in violation of Section 8(b)(4)(B) of the Act (J.A. 275–291). In holding that Local 418's object was secondary, and not merely an incident of lawful primary activity as the union contended, the Board found that the ship operated by Upper Lakes was an ambulatory primary situs temporarily located at the premises of a neutral employer, Continental; noted that in common situs situations there is an obligation to minimize the pressure on the neutral; and concluded that this obligation had not been fulfilled by the union here. The Board pointed out that Local 418 had "engaged in the acts of inducement complained of in response to appeals for support made by SIU, Canada, long before the primary situs in the form of the S.S. *Shaw* was located at Continental's premises"; the "inducements were not in implementation of a lawful SIU, Canada, picket line nor of any other contemporaneous notice by SIU, Canada, that it was engaging in a primary dispute with Upper Lakes shipping"; and Local 418 "made direct threats to Con-

tinental of trouble elsewhere if it persisted in using Upper Lakes ships to transport its grain" (J.A. 291). The Board ordered Local 418 to cease and desist from its unlawful conduct and to post appropriate notices (J.A. 292).

The court of appeals found that the Board had reasonably applied Section 8(b)(4)(B) to the facts of the particular case, and therefore enforced the Board's order (Pet. App. 1a–15a).

ARGUMENT

The decision of the court below, sustaining the Board's application of the secondary boycott provisions of the Act in a rather unusual factual situation, presents no issue warranting review by this Court.

1. As this Court observed in *Electrical Workers v. National Labor Relations Board (General Electric)*, 366 U.S. 667, 673, "the distinction between legitimate 'primary activity' and banned 'secondary activity' * * * does not present a glaringly bright line." The task of distinguishing between the two types of activity is especially difficult "in the 'common situs' cases—situations where two employers were performing separate tasks on common premises" (*id.* at 676–677). In the typical common situs case (*e.g., Sailors' Union of the Pacific (Moore Drydock)*, 92 N.L.R.B. 547), a union having a dispute with a primary employer who has a mobile business, like shipping or trucking, pickets at the premises of a neutral employer where the ambulatory situs of the primary dispute has temporarily come to rest. In such a case

the Board requires "that the picketing clearly disclose that the dispute was only with the primary employer" (366 U.S. at 677).

In the present case there was no picketing at the common situs by the union engaged in the primary dispute (SIU). The secondary employees were induced to cease performing work for their employer—Continental, a neutral—solely as a result of appeals made to them by their union (Local 418), which was not involved in the primary dispute. The Board pointed out that, in the absence of "some clear and contemporary notice given by the primary union to the employees appealed to, and to the neutral employer at whose premises the dispute becomes active, that the labor dispute involved is between it and the primary employer * * *, the dispute takes on the appearance and character of a dispute between the 'inducing' union and the neutral employer over the latter's dealings with the primary employer rather than of a dispute between the primary union and the primary employer" (J.A. 288). Moreover, as the court below noted (Pet. App. 11a), without such disclosure "the work stoppages might lead outside parties having business with the neutral employer to think he is directly involved in the dispute and accordingly to cease dealing with him."[4] In view of the absence of notice here—

[4] Although such notice could conceivably be given by means other than picketing, it is within the Board's power to require, as it has, that picketting—which clearly identifies the primary employer—be the mode of notification. As the court below said (Pet. App. 13a), the "Board could properly adopt a rule that would assure general and adequate notice, and avoid a doctrine that would require it to determine in each case all the employees

and the further fact that Local 418 "made direct threats to Continental of trouble elsewhere if it persisted in using Upper Lakes ships to transport its grain" (J.A. 291; *supra*, pp. 6–7)—the Board was warranted in finding that Local 418's appeals to Continental's employees exceeded the bounds of legitimate primary activity and constituted secondary activity proscribed by Section 8(b)(4)(B) of the Act.

2. The arguments of petitioner do not require a contrary conclusion.

a. Petitioner contends that, since the "refusal of the longshoremen to load the SS *Shaw* was a refusal by employees of a secondary employer to perform tasks which aided the primary employer's everyday operations," it was primary under the tests enunciated in *Electrical Workers* v. *National Labor Relations Board* (*General Electric*), 366 U.S. 667, and *Steelworkers* v. *National Labor Relations Board* (*Carrier*), 376 U.S. 492 (Pet. 7). In those cases, the Court did hold that, since it is a normal goal of a primary strike to attempt to halt "the day-to-day operations of the struck employer" (*Steelworkers, supra,* 376 U.S. at 499), picketing and related appeals by the union engaged in the primary dispute to neutral employees "whose tasks aid the employer's everyday operations" (*Electrical Workers, supra,* 366 U.S. at 681) constituted privileged primary activity when engaged in at the premises of the struck employer (as in *Electrical Workers*) or at a railroad gate adjoining those premises (as in *Steelworkers*). But nothing in those cases

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that might have occasion to visit the plant and whether they do or would have adequate notice of the labor situation."

stands for the broad proposition, urged by petitioner, that so long as neutral employees are asked to do no more than to cease aiding the normal operations of the struck employer's business the appeal to them—irrespective of the means used, the location where it is made, and the identity of the union making it—is always privileged. Indeed, in *Steelworkers* the Court declined to rule even that the union engaged in the primary dispute was free to appeal to the neutral railroad employees at the railroad depot or other locations remote from the struck employer's premises. It limited its holding to the precise factual situation before it, where the "railroad gate adjoined company property and was in fact the railroad entrance to the Carrier plant" (*Steelworkers*, 376 U.S. at 500). Neither *Electrical Workers* nor *Steelworkers* dealt with a situation like that here, where the appeals to the neutral employees were made by their own union, which was not involved in the primary dispute; these appeals occurred at the premises of the neutral employer; and, although the situs of the primary dispute was temporarily there, there was no picketing which clearly marked the primary employer as the target of the dispute.

b. Nor is the decision of the court below in conflict with *Houston Contractors Assn.* v. *National Labor Relations Board*, 386 U.S. 664 (Pet. 8). Although the Court there found that inducement by a union not directly involved in the primary dispute was legitimate primary activity, the inducement was directed to a group of employees of the *primary* employer. "Since that situation does not involve the

employer in a dispute not his own, his employees' conduct in support of their fellow employees is not secondary and, therefore, not a violation of § 8(b)(4)(B)." 386 U.S. at 669. Here, in contrast, the union not involved in the dispute induced the employees of a *neutral* employer, thereby involving that employer "in a dispute not his own"—the essence of forbidden secondary conduct.

c. Finally, there is no merit to petitioner's suggestion that the Board and the court below have enunciated "a broad rule of general application * * * which will have fundamental and far-reaching importance to labor-management relations" (Pet. 8). The facts of the present case are special. As the court below emphasized, "We need not here consider whether the Act's secondary boycott provisions may be enforced so as to bar all secondary work stoppage appeals that are unaccompanied by primary picketing. The Board has not gone that far" (Pet. App. 11a; see, also, 13a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 545

GRAIN ELEVATOR, FLOUR AND FEED MILL WORKERS, INTERNATIONAL LONGSHOREMEN ASSOCIATION, LOCAL 418, AFL-CIO, *Petitioner,*

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NATIONAL LABOR RELATIONS BOARD.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY MEMORANDUM FOR PETITIONER

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NATIONAL LABOR RELATIONS BOARD.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY MEMORANDUM FOR PETITIONER

In its Brief in Opposition the Board takes pains to suggest that the judgment below is based on "the particular circumstances of this case" (Opp. p. 2), that the factual situation in this case is "rather unusual" (Opp.

p. 7) and the facts "special" (Opp. p. 11). This is a normal and often appropriate technique in briefs in Opposition, since in determining whether *certiorari* should be granted it is a weighty consideration whether the question is likely to arise again. In the particular circumstances of *this* case, however, the argument will not serve, because the Court below expressly rested judgment on its understanding that the Board had "evolved *a general requirement* in terms of likelihood of providing adequate notice, intending it to apply without regard to whether the particular case reflected actual notice provided in some other way." (Pet. p. 13a, emphasis supplied). And the Brief in Opposition here acknowledges that the Board has required "that picketing—which clearly identifies the primary employer—be the mode of notification." (Opp. p. 8, n. 4). The "general requirement" the Board has evolved applies to all common situs situations (see Opp. pp. 7-9), whose "incidence", this Court has recognized, "is extensive," *Electrical Workers* v. *Labor Board, (General Electric)* 366 U.S. 667, 671; it prohibits even appeals which only urge the neutral employees to withhold their services in aid of the struck employer's everyday operations, although these have been held to be lawful primary strike activity. *General Electric, supra* at 681; *Steelworkers* v. *Labor Board, (Carrier)*, 376 U.S. 492, 499. The present case is "unusual" only in its result.

The Board acknowledges (Opp. p. 9) that *General Electric* and *Carrier* held that it is a normal goal of a primary strike to attempt to halt the day-to-day operations of the struck employer. But it attempts to distinguish those decisions on the ground that neither

"dealt with a situation like that here, where the appeals to the neutral employees were made by their own union, which was not involved in the primary dispute; those appeals occurred at the premises of the neutral employer; and, although the situs of the primary dispute was temporarily there, there was no picketing which clearly marked the primary employer as the target of the dispute." (Opp. p. 10). None of the purported differences is valid; nor has this Court ever approved these purported limitations on its clear holdings in *General Electric* and *Carrier*.

Since, as this Court held in *Houston Contractors Association* v. *Labor Board*, 386 U.S. 664, liability under § 8(b)(4)(B) depends on the means and objectives of the union, and not on its identity, nothing can turn on the fact that the appeals herein were made by the neutral employees' own union. The Board points out that unlike the union in *Houston Contractors* "the petitioner induced the employees of a *neutral* employer, thereby involving that employer in a dispute not his own."[1] (Opp. p. 11) But when the Board proposed to this Court the interpretation of § 8(b)(4)(B) which prevailed in *Houston*, it advanced no such qualification. On the contrary, the Board expressly relied on *Milwaukee Plywood Corporation* v. *N.L.R.B.*, 285

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[1] Since the neutral employers were induced only to engage in lawful primary strike activities as defined in *General Electric* and *Carrier*, the appeal did not involve a neutral in "a dispute not his own." Insofar as the Board points to the source of the appeals to distinguish *General Electric* and *Carrier*, and then to the nature of the appeals to distinguish *Houston Contractors*, its argument is, of course, circular.

F. 2d 325 (C.A. 7)[2] a case in which the "secondary union," had induced the employees of a neutral employer, and the action was held lawful. In *Milwaukee Plywood,* the Board itself said: "The fact that one labor organization rather than another is engaging in allegedly unlawful conduct does not afford a basis to resolve the issue of legality." 126 NLRB 650, 651. That the Board should now seek to reopen the question which this Court settled at the Board's insistence as recently as last April, adds to the propriety of granting review. Surely the rule must be the same whether the Board decides to follow it—as in all prior cases—, or to ignore it—as in this case.

Nor can *General Electric* and *Carrier* be distinguished on the ground that the appeals here occurred at the premises of the neutral employer. This was likewise true in *Carrier,* but the Court regarded the fact to be of "little, if any significance." 376 U.S. at 500.

> "The railroad gate adjoined company property and was in fact the railroad entrance gate to the Carrier plant. For the purposes of § 8(b)(4) picketing at a situs so proximate and related to the employer's day-to-day operations is no more illegal than if it had occurred at a gate owned by Carrier." *Id.*

Here the primary situs of the dispute was the ship of the primary employer. When that ship docked at the premises of the neutral employer, the situs of this dispute was at least equally proximate and related to

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[2] Indeed, the Board's own Petition for Certiorari in *Houston* was based on a conflict with the Seventh Circuit's decision in *Milwaukee Plywood.* Petition for Certiorari, No. 413, October Term, 1966, p. 9.

the employer's day-to-day operations as that in *Carrier:* indeed there was no closer place at which the appeals could have been made.[3]

Of the matters assigned to escape the holding of *General Electric* and *Carrier* there thus remains only the fact that there was no picketing. And it is the Board's holding that liability under section 8(b)(4)(B) can be based on the *absence* of picketing, which is at the heart of this case. The Brief in Opposition does not deny that this is a startling innovation in the law of secondary boycotts, nor does it explain why the Board should require "as it has, that picketing which clearly identifies the primary employer be the mode of notification." (Opp. p. 8, n. 4).[4] Most significantly, however, for present purposes, the Board does not dispute our analysis of the adverse consequences of its rule and their importance on the administration of the Act. Rather the Board seeks to avoid review by claiming that the case rests on its special facts—contrary not only to the express reliance below on a "general requirement" of the Board, but also to its acknowledgment here that it has created a rule to be applied in all such cases.

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[3] The location was identical to that of the appeals which were held lawful in the leading *Moore Dry Dock* case, 92 NLRB 547, in which the proximity test originated, and in *Seafarers' Int'l Union* v. *N.L.R.B.*, 265 F. 2d 585 (C.A.D.C.) Accordingly, the Board's observation that the Court in *Carrier* declined to give an advisory opinion as to the legality of appeals "remote from the struck employer's premises" (Opp. p. 10) is purely diversionary.

[4] The Board advisedly declines to adopt the Court of Appeals' statutory analysis, for the Court's reading of the proviso to § 8(b)(4)(B) only compounds the chaos wrought in the law of secondary boycotts by this case, and the necessity that this Court restore the order established by its prior decisions.

While relying on the holding below that the Board (and any other agency) "could properly adopt a rule * * * and avoid a doctrine that would require it to determine in each case" whether obedience to the rule is necessary to accomplish the statutory end, (Opp. p. 8 n. 4), the Brief in Opposition fails even to acknowledge the existence of the second question presented by our Petition, which challenges this judicial imputation of broad legislative power to administrative agencies. A judgment based on a proposition so fundamentally inconsistent with the primary purpose of judicial review—to preserve the rule of law in administrative proceedings—plainly warrants the attention of this Court.

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